Supreme Court of the United States

October Term, 1951.
No. 431.

TESSIM ZORACH and ESTA GLUCK,

Appellants,

vs.

ANDREW G. CLAUSON, JR., *et al.*,

Appellees.

Motion of State of California for Leave to File Brief Amicus Curiae, and Brief of State of California as Amicus Curiae in Support of Appellees' Position.

EDMUND G. BROWN,
Attorney General of California,
WILLIAM V. O'CONNOR,
Chief Deputy Attorney General,
HOWARD S. GOLDIN,
Deputy Attorney General,
217 West First Street,
Los Angeles 12, California,
Attorneys for Amicus Curiae, State of California.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Motion of State of California, a Sovereign State, for Leave to File a Brief Amicus Curiae, in Support of Position of the Appellees, Board of Education of the City of New York and the New York State Commissioner of Education Urging the Constitutionality of the New York State "Released Time Program."

Motion.

The State of California, sponsored and appearing by its Attorney General, respectfully moves that it may be permitted to file a brief *Amicus Curiae*, pursuant to Rule 27, 9(d) of this Honorable Court, in support of the position of appellees, Board of Education of the City of New York, and the New York State Commissioner of Educa-

tion urging the constitutionality of the New York State "released time law."

EDMUND G. BROWN,
Attorney General of the State of California,

WILLIAM V. O'CONNOR,
Chief Deputy Attorney General,

HOWARD S. GOLDIN,
Deputy Attorney General,

Attorneys for Amicus Curiae, State of California.

IN THE

Supreme Court of the United States

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TESSIM ZORACH and ESTA GLUCK,

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Appellees.

Brief of State of California as Amicus Curiae in Support of Appellees' Position.

Interest of the State of California.

The instant appeal challenges the constitutionality of the "released time" program in New York City, whereby parents may withdraw their children from public schools one hour a week to receive religious instruction in the faith of their acceptance. Such New York City program found statutory authorization in Section 3210 of the New York Education Law, L. 1940, Ch. 305, Sec. 1. Like the State of New York, the State of California has a released time statute, namely Section 8286 of the Education Code

of the State of California,[1] the constitutionality of which statute has been upheld by the California courts in the case of *Gordon v. Board of Education of the City of Los Angeles*, 78 Cal. App. 2d 464, 174 P. 2d 488, hearing denied by California Supreme Court, 78 Cal. App. 2d 481, 178 P. 2d 488 (1947).

The People of the State of California through their legislature, in the enactment of Section 8286 of the California Education Code have approved the policy of statutory authorization for released time programs. Where, as in the instant case, an expression of similar policy by a sister state has been expressed in legislation and a released time program which appears constitutionally unobjectionable, California is interested in having established the validity thereof.

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[1]California Education Code, Section 8286, added by Stats. 1943, Chap. 367, reads as follows:

"Pupils, with the written consent of their parents or guardians, may be excused from school in order to participate in religious exercises or to receive moral and religious instruction at their respective places of worship or at other suitable place or places designated by the religious group, church, or denomination, which shall be in addition and supplementary to the instruction in manners and morals required elsewhere in this code. Such absence shall not be deemed absence in computing average daily attendance, if all of the following conditions are complied with:

(a) The governing board of the district of attendance, in its discretion, shall first adopt a resolution permitting pupils to be absent from school for such exercises or instruction.

(b) The governing board shall adopt regulations governing the attendance of pupils at such exercises or instruction and the reporting thereof.

(c) Each pupil so excused shall attend school at least the minimum school day for his grade for elementary schools, and as provided by the relevant provisions of the rules and regulations of the State Board of Education for secondary schools.

(d) No pupil shall be excused from school for such purpose on more than four days per school month.

It is hereby declared to be the intent of the Legislature that this section shall be permissive only."

Statement of the Case.

Petitioners, citizens and taxpayers, and parents of children attending public school in the City of New York, brought a proceeding pursuant to Article 78 of the New York Civil Practice Act against two respondents, namely, the Board of Education of the City of New York and the Commissioner of Education of the State of New York seeking an order directing the respondents to discontinue the practice in New York State of releasing children from the public schools to permit them to receive religious instruction. Such practice, often designated as a "released time" program, authorizes the excusing of pupils from school for one hour or less weekly, upon request of their parents, to enable them to attend classes in religious instruction or education, outside of the school buildings and premises and under the auspices of the churches of the parents' acceptance. The enabling state statute in New York authorizing such released time program is Section 3210 of the Education Law[2] and pursuant thereto the

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[2]Section 3210 of the New York Education Law provides:

"Amount and character of required attendance.

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. *Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.*" (Emphasis added.)

Commissioner of Education promulgated certain rules[3] while additional rules were established by the New York City Board of Education.[4]

The petition challenged the enabling statute and the rules of the Commissioner and Board of Education upon the ground that they violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the states by the Fourteenth Amendment, and upon the ground that they prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the

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[3]The State Commissioner of Education has promulgated the following rules Regulations of Comr. of Educ., Art. 17, Sec. 154; 1 N. Y. Official Compilation of Codes, Rules and Regulations, p. 683:

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

[4]Additional Rules Established by New York City Board of Education are set forth in *Zorach, et al. v. Clauson, et al.* (Ct. App. N. Y.), 100 N. E. 2d 463, at pp. 464-465, as follows:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils

Federal Constitution and Section 3, Article I of the New York State Constitution.

The Supreme Court, Special Term, Kings County, Part 1, Di Giovanna, J., held that assuming all the facts set forth in the petition were deemed to be true nothing had been shown to warrant a finding that the statute enabling the "release time program" was unconstitutional or that the regulations adopted by the respondents under the statute were arbitrary, capricious or unreasonable, whereupon the petition was dismissed as a matter of law.

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concerned. There will be no announcement of any kind in the public schools relative to the program.

2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Opinions Below.

The opinion of the Supreme Court, Special Term, Kings County, reported in 198 Misc. 631, 99 N. Y. S. 2d 339, was affirmed by the Appellate Division, Second Judicial Department in 278 App. Div. 573, 102 N. Y. S. 2d 27. Subsequently, the order of said Appellate Division was affirmed by the Court of Appeals of New York by opinion reported in 303 N. Y. 161, 100 N. E. 2d 463.

Question Presented.

Is the instant New York released time program, as authorized by statute, unconstitutional upon the ground that it violates the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the states by the Fourteenth Amendment, or upon the ground that it prohibits the free exercise of religion in violation of the First and Fourteenth Amendments of the Federal Constitution and Section 3, Article I of the New York State Constitution?

ARGUMENT.

I.

The Constitutionality of Similar Released Time Programs Heretofore Has Been Determined by New York Courts.

The New York Court twice prior to the instant case has sustained the constitutionality of similar released time programs to the one herein involved. Specifically, in 1925 a released time program in the City of Mt. Vernon, New York, had been declared invalid, as ". . . . contrary to the intent and meaning of Section 621 of the Education Law . . . requiring every child to attend upon instruction for the *entire time* during which the schools are in session," and because public school presses were used to print the religious classes attendance cards. (*Stein v. Brown* (1925), 125 Misc. 692, 211 N. Y. Supp. 822.) However, two years later, a released time program of White Plains, New York, which differed from that of Mt. Vernon only in that the public school presses were not used to print the religious classes attendance cards, was held constitutional in *People ex rel. Lewis v. Graves* (1927), 245 N. Y. 195, 156 N. E. 662, by a unanimous Court of Appeals. Indeed, the New York Court of Appeals in *Zorach, et al. v. Clauson, et al.* (1951), 303 N. Y. 161, 100 N. E. 2d 463, 466, said:

"Binding precedent must therefore be found in our own decision of nearly twenty-five years ago in Peo-

ple *ex rel.* Lewis v. Graves, *supra*, which involved a released time program in the city of White Plains. Such program, except for the absence of a State enabling act, was substantially the same as the one now in issue. . . ."

Both *Stein v. Brown, supra,* and *People ex rel. Lewis v. Graves, supra,* were decided prior to the passage of an enabling statute by the New York legislature. Subsequently, an enabling statute, New York Education Law 3210, subdiv. 1, para. b., L. 1940, Ch. 305, providing that absence from attendance upon instruction as required by that statute shall be permitted for religious observance and education under rules that the Commissioner of Education shall establish, was held constitutional in *Matter of Lewis v. Spaulding* (1948), 193 Misc. 66, 85 N. Y. S. 2d 682, appeal withdrawn 299 N. Y. 564, 85 N. E. 2d 791 (1949). In the *Matter of Lewis v. Spaulding,* the Supreme Court of New York considered the then rendered case of *People of the State of Illinois ex rel. McCollum v. Board of Education* (1948), 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A. L. R. 2d 1338, and in declaring the enabling statute constitutional stated:

". . . the constitutionality of a released time program is to be tested by a consideration of the factual aspects of the particular program under scrutiny."

II.

A California Released Time Program Authorized by Statute Has Been Held Constitutional by the California Court.

The preamble to the Constitution of California, reading as follows:

> "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution,"[5]

is almost a replica of the preamble of the Constitution of the State of New York, which declares:

> "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, Do Establish This Constitution."[6]

Section 4 of Article I of the Constitution of California in part provides that:

> ". . . the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State; . . ."

Similarly, Article I, Section 3 of the New York State Constitution reads as follows:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or

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[5]See: *Gordon v. Board of Education of City of Los Angeles* (1947), 78 Cal. App. 2d 464, 477, 178 P. 2d 488, 495.

[6]See: Opinion of Supreme Court, Special Term, Kings County, Part 1, in *Zorach v. Clauson* (1950), 198 Misc. 631, 99 N. Y. S. 2d 339, 344.

preference, shall forever be allowed in this state to all mankind; . . ."

Section 8 of Article IX of the California Constitution[7] prohibits the appropriation of any public money for the support of any sectarian or denominational school,

> "nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly, or indirectly, in any of the common schools of this State."

Section 30 of Article IV of the Constitution of California[8] prohibits the granting of anything in aid of any religious sect, church, creed or sectarian purpose.

Holding that the California law (California Education Code, Section 8286) and a released time plan in the City of Los Angeles did not violate the Constitution of the

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[7]*California Constitution, Article IX, Section 8,* reads:

"No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."

[8]*California Constitution, Article IV, Section 30,* provides:

"Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 22 of this article."

United States nor any of the following provisions of the Constitution of the State of California, to-wit: Section 4 of Article I, Section 8 of Article IX, and Section 30 of Article IV, is the case of *Gordon v. Board of Education of City of Los Angeles* (1947), 78 Cal. App. 2d 464, 474, 476, 178 P. 2d 488, 494-495, hearing denied by our Supreme Court May 8, 1947.

In *Gordon v. Board of Education,* a unanimous court observed:

> ". . . . Reference to the debates of the constitutional convention which presented the Constitution of 1879 to the people of California demonstrates that there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state, and to provide that the power and the authority of the state should never be devoted to the advancement of any particular sect or denomination. . . . ."[9]

Thereafter, this same court said:

> "No one who keeps pace with the trends of modern society can deny that instruction of the youth of the state in faith and morality is of utmost necessity and importance. . . . What more logical advance could be made in the science of sociology than the unification of religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?"[10]

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[9]78 Cal. App. 2d 464, 472-473, 178 P. 2d 488, 493.

[10]78 Cal. App. 2d 464, 474, 178 P. 2d 488, 494.

In the *Gordon* case, *supra,* is contained a powerful and well-reasoned concurring opinion by Mr. Justice White who wrote:

> "Throughout her entire argument, appellant misconceives the American principle of religious freedom. What she contends for, is freedom *from* religion rather than freedom *of* religion. Appellant's argument leads one to the conclusion that the doctrine of separation of church and state looks upon religion as something intrinsically evil, and against which there should be a rigid quarantine. Nothing is farther from the true concept of the American philosophy of government than such an argument. In the constitution of every state of the union is to be found language which either directly, or by clear implication, recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community . . . "[11]

Further, Mr. Justice White declared:

> "Under our California statute, no particular denomination or religious faith is favored, no part of the religious instruction is held in the schoolroom on school property, and no one is required to attend. To act in accordance with his lack of religion is the right of the man of no religion, but he has no right to insist that others shall have no religion."[12]

and that:

> "The true and essential purpose of the American doctrine of separation of church and state is to protect people in the fullest enjoyment of religious freedom and to forestall compulsion by law of the accept-

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[11]78 Cal. App. 2d 464, 476, 178 P. 2d 488, 495.
[12]78 Cal. App. 2d 464, 479, 178 P. 2d 488, 497.

ance of any creed or the practice of any particular form of worship, but the decisions in both the federal and state courts furnish unmistakable authority for the proposition that the doctrine of separation of church and state does not mean that there is any conflict between religion and state in this country or any disfavor of any kind upon religion as such."[13]

Finally, as his reasons for sustaining the constitutionality of the California released time program, Mr. Justice White said:

"The essence of the Released Time Religious Education Program (Ed. Code, §8286) is to authorize governing boards of school districts, within their discretion, to permit pupils to be excused from school at the request of their parents for the purpose of attending classes of religious instruction maintained and operated by religious faiths of their own choosing. Examination of the statute reveals nothing opposed to the constitutional guarantee insuring religious liberty, freedom of conscience and preventing the establishment of a particular religion. The code section in question does not in any way interfere with religious freedom. It does not work an establishment of religion, provide for compulsory support, by taxation or otherwise, of religious instruction, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience, or impose restrictions upon the expression of religious belief."[14]

For the very same reasons, this *Amicus Curiae* urges that the New York released time program herein under review, also is constitutional.

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[13] 78 Cal. App. 2d 464, 480, 178 P. 2d 488, 497-498.

[14] 78 Cal. App. 2d 464, 478-479, 178 P. 2d 488, 497.

III.

The Case of People of State of Illinois ex rel. McCollum v. Board of Education Is Distinguishable From the Instant Case.

Appellees' attack on the constitutionality of the New York released time program herein under scrutiny is based almost exclusively upon the case of *People of the State of Illinois ex rel. McCollum v. Board of Education* (1948), 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A. L. R. 2d 1338, which held that a "released time" plan in use in Champaign, Illinois, violated the First and Fourteenth Amendments to the United States Constitution.

The main opinion in the *McCollum* case, *supra*, written by Mr. Justice Black, pointed out that:

> ". . . Illinois has a compulsory education law which, with exceptions, requires parents to send their children, aged seven to sixteen, to its tax supported public schools where the children are to remain in attendance during the hours when the schools are regularly in session. Parents who violate this law commit a misdemeanor punishable by fine unless the children attend private or parochial schools which meet educational standards fixed by the State. District boards of education are given supervisory powers over the use of the public school buildings within the school district. . . ."[15]

In the Champaign case, the board of education of a school district permitted religious teachers employed by private religious groups to come weekly into the schools during regular school hours and for thirty or forty-five

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[15]333 U. S. 203, 205, 68 S. Ct. 461, 462, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

minute periods. Classes were made up of pupils whose parents signed printed cards requesting that the child be permitted to attend. A council consisting of Jewish, Roman Catholic and Protestant faiths employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. Students who did not choose to take religious instruction were not released from classes but were required to go to some other place in the school building to pursue their secular studies. Students who were released for religious instruction were required to be present at the religious classes conducted in the regular classrooms of the school building and reports of their presence or absence were made to their secular teachers.

The main opinion by Mr. Justice Black in the *McCollum* case rejected the above plan in the following language:

> "The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First

> Amendment (made applicable to the States by the Fourteenth) as we interpreted it in Everson v. Board of Education, 330 U. S. 1, 67 S. Ct. 504.)"[16]

and further stated:

> "Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State."[17]

In the *McCollum* case, the religious teachers employed by private religious groups, were permitted to come weekly into the school buildings during the regular school hours set apart for secular teaching and the religious instruction was given in the regular classrooms of the public school buildings. These peculiar facts justified the criticism in the *McCollum* case that the State helped to provide pupils for the religious classes through use of the compulsory school machinery. However, the released time program in New York City herein involved is free from the defects of the Champaign system for no tax-supported public school property or funds are used for the dissemination of religious doctrines, nor is New York's compulsory education law used to assist in the enrollment of pupils for religious classes.

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[16]333 U. S. 203, 209-210, 68 S. Ct. 461, 464, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

[17]333 U. S. 203, 212, 68 S. Ct. 461, 465-466, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

Moreover, in the *McCollum* case, Mr. Justice Frankfurter delivered a concurring opinion in which he was joined by Justices Jackson, Rutledge and Burton. In such opinion it was said the Champaign, Illinois, plan was unconstitutional because Illinois there authorized the commingling of sectarian with secular instruction in the public schools,[18] because there religious instruction was so conducted on school time and property as to be *patently* woven into the working scheme of the school,[19] and because the school authorities there sponsored and effectively furthered religious beliefs by its educational arrangement.[20]

Yet the opinion of Mr. Justice Frankfurter joined in by three associates does point out that released time programs are not *per se* unconstitutional.

Specifically, Mr. Justice Frankfurter's opinion declares:

> "Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several donominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual

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[18]333 U. S. 203, 212, 68 S. Ct. 461, 466, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

[19]333 U. S. 203, 227, 68 S. Ct. 461, 473, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

[20]333 U. S. 208, 231, 68 S. Ct. 461, 475, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court."[21]

Again, Mr. Justice Frankfurter wrote:

"We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program. . . ."[22]

Thereafter in a separate opinion Mr. Justice Jackson also recognized "permissible limits" when he said:

". . . While I agree that the religious classes involved here go beyond permissible limits, I also

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[21]333 U. S. 203, 225, 68 S. Ct. 461, 472, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

[22]333 U. S. 203, 231, 68 S. Ct. 461, 475, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

think the complaint demands more than plaintiff is entitled to have granted. So far as I can see this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself."[23]

Finally, Mr. Justice Reed in a dissenting opinion construed the ruling in the *McCollum* case as leaving open for further litigation variations from the Champaign, Illinois, plan.[24] However, Mr. Justice Reed unequivocally stated:

"Well-recognized and long-established practice support the validity of the Illinois statute here in question. That statute, as construed in this case, is comparable to those in many states. All differ to some extent. New York may be taken as a fair example. . . ."[25]

Consequently, when in the *McCollum* case four justices opined that released time statutes are not *per se* unconstitutional and a fifth justice dissented from the declaration of unconstitutionality of the Champaign plan, it is apparent that the *McCollum* case cannot be regarded as authority for the proposition that all released time programs are invalid. To the contrary it would appear that the decision in each case as regards constitutionality will depend upon the particular facts and operating modes of

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[23]333 U. S. 203, 237, 68 S. Ct. 461, 478, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

[24]333 U. S. 203, 240, 68 S. Ct. 461, 479, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

[25]333 U. S. 203, 250-251, 68 S. Ct. 461, at 484, 92 L. Ed. 649, 2 A. L. R. 2d 1338, where Mr. Justice Reed cited with approval *People ex rel. Lewis v. Graves*, 245 N. Y. 195, 156 N. E. 663.

each such program, the pivotal questions of use of public property and funds, the participation by public school authorities, and the effect upon the children and the community.

The distinguishing features between the New York released time program herein being reviewed and the Champaign Plan declared unconstitutional in the *McCollum* case best were illustrated by Justice Di Giovanna of the Supreme Court in the form of the following chart [R. 90-91] setting in apposition distinctive features of both plans:

CHAMPAIGN PLAN.	NEW YORK CITY PLAN.
1. No underlying enabling State statute.	1. Education Law, Sec. 3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish."
2. Religious training took place in the school buildings and on school property.	2. Religious training takes place outside of the school building and off school property.

Champaign Plan.	New York City Plan.
3. The place for instruction was designated by school officials.	3. The place for instruction is designated by the religious organization in cooperation with the parent.
4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.	4. No element of segregation is present.
5. School officials supervised and approved the religious teacher.	5. No supervision or approval of religious teachers or course of instruction by school officials.
6. Pupils were solicited in school buildings for religious instruction.	6. School officials do not solicit or recruit pupils for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.	7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.
8. Non-attending pupils isolated or removed to another room.	8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
	9. No credit given for attendance at the religious classes.

Champaign Plan.	New York City Plan.
	10. No compulsion by school authorities with respect to attendance or truancy.
	11. No promotion or publicizing of the released time program by school officials.
	12. No public moneys are used.

Based upon the foregoing factual distinctions in the chart of Mr. Justice Di Giovanna hereinabove reproduced, this *Amicus Curiae* sincerely believes the instant New York released time program to be free from any of the defects which rendered the Champaign Plan unconstitutional in the *McCollum* case.

Conclusion.

It has been reported that more than 2,000,000 American school children in our public schools are participating in "released time" programs. *The Public and Education, Vol. 3, No. 3, May 25, 1948.*[26] Further, in *Gordon v. Board of Education of the City of Los Angeles* (1947), 78 Cal. App. 2d 464, 479, 178 P. 2d 488, 497, it was said that either by express statutory provisions, court deci-

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[26] See also: 39 Georgetown Law Journal 148, 150; 14 U. of Detroit Law Journal 216-217; and *People of the State of Illinois ex rel. McCollum v. Board of Education* (1948), 333 U. S. 203, 68 S. Ct. 461, 472, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

sions, rulings of the State Attorneys General, or opinions of state boards of education or Chief State School Officers, forty states authorize the release of public school pupils for weekly religious instruction.

The State of California believes that it is both important and desirable for the Supreme Court of the United States now to clearly and unequivocally verify that its holding in the *McCollum* case was confined to the particular released time program therein reviewed, and that other and factually distinguishable released time programs in operation elsewhere may be free from constitutional objection.

Because of its sincere belief in the constitutionality of the program in the instant case, this *Amicus Curiae* adds its voice to those of the appellees and the other *Amici Curiae* in support of appellees' position, in the prayer that this Honorable Court affirm the judgment herein.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of California,
WILLIAM V. O'CONNOR,
Chief Deputy Attorney General,
HOWARD S. GOLDIN,
Deputy Attorney General,
Attorneys for Amicus Curiae, State of California.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of January, A. D. 1952.

1-17-52—65